



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 14, 1993

Honorable Warren Chisum
Chairman
Committee on Environmental Regulation
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 93-84

Re: Sharing of "co-management
fees" between optometrists and oph-
thalmologists (ID# 19049)

Dear Representative Chisum:

You have requested an opinion about section 161.091 of the Health and Safety Code, which prohibits licensed health care personnel from giving or receiving illegal remuneration.¹ Section 161.091 of the Health and Safety Code provides as follows:

(a) A person licensed, certified, or registered by a health care regulatory agency of this state commits an offense if the person intentionally or knowingly offers to pay or agrees to accept any remuneration directly or indirectly, overtly or covertly, in cash or in kind, to or from any person, firm, association of persons, partnership, or corporation for securing or soliciting patients or patronage.

This provision is intended to prohibit only payments, business arrangements, and payments practices prohibited by the anti-kickback provision of the Medicare law, and regulations promulgated thereunder. Health & Safety Code § 161.091(f); *see* 42 U.S.C. § 1320a-7b(b).² Offenses under section 161.091 are a Class A misdemeanor for a first offense and a third degree felony if the person has a prior conviction under that section. Health & Safety Code § 161.091(c). Violation of the statute is also grounds for disciplinary action by the person's regulatory agency. *Id.*

¹Section 161.091 of the Health and Safety Code is a "limited anti-kickback provision." Stone, *Legislature Expands Prohibition on Illegal Remuneration among Health Care Providers*, PERSPECTIVES, Jan. 1992, at 1.

²Violations of the federal provision include soliciting or receiving any remuneration (including a kickback, bribe, or rebate) in return for referring an individual to a person for any item or service paid for under Medicare and offering or paying remuneration to any person to induce him to refer an individual to a person for such items or services. 42 U.S.C. § 1320a-7b(b).

Your question about section 161.091 arises in connection with the payment of a "global fee" under the Medicare program³ for ophthalmological surgery and post-surgical care. The global fee for surgical procedures is a "single fee . . . billed and paid for all necessary services normally furnished by the surgeon before, during, and after the procedure," 56 Fed. Reg. 59513, in contrast to separate fees for the surgery and each pre-operative or post-operative visit, 1 MEDICARE AND MEDICAID GUIDE (CCH) paras. 3408, 3435 (1992). When an ophthalmologist performs a surgical procedure, and an optometrist performs the follow-up care, the optometrist may bill Medicare for and receive payment based on the post-operative percentage for the procedure. *Id.* para. 3435, at 1299-34.

An optometrist may refer a patient to an ophthalmologist for surgery and subsequently provide the post-operative care. You ask whether the ophthalmologist violates section 161.091 of the Health and Safety Code when he co-manages a patient with an optometrist in this way and thereby consents to having Medicare pay a fee to the optometrist.

These facts alone do not show a violation of section 161.091. To violate this statute, the ophthalmologist would have to intentionally or knowingly offer remuneration to the optometrist "for securing or soliciting patients or patronage." When an optometrist receives a portion of a global fee for providing post-operative care for a patient after ophthalmological surgery, he is presumably being paid for caring for the patient and not for initially referring the patient to the ophthalmologist. Moreover, although federal law prohibits the payment of kickbacks to induce anyone to refer patients for the provision of services paid for under Medicare, title 42 of the United States Code section 1320a-7b(b), the fee schedules for the Medicare program established by the Secretary of Health and Human Service pursuant to the Medicare statute⁴ provide for global surgery fees. An ophthalmologist does not violate section 161.091 of the Health and Safety Code merely by co-managing a patient with an optometrist and thereby consenting to have Medicare pay a fee to the optometrist.

S U M M A R Y

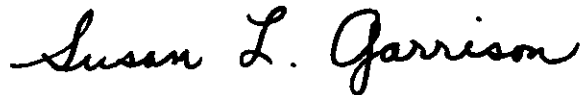
An ophthalmologist does not violate section 161.091 of the Health and Safety Code merely by co-managing a patient with an optometrist and thereby consenting to have Medicare pay a fee to the optometrist. To violate this provision, the ophthalmologist would also have to intentionally or knowingly offer to pay remuneration to

³42 U.S.C. § 1395 *et seq.*

⁴42 U.S.C. § 1395w-4.

"any person, firm, association of persons, partnership, or corporation
for securing or soliciting patients or patronage."

Yours very truly,

A handwritten signature in cursive script that reads "Susan L. Garrison". The signature is written in black ink and is positioned above the printed name and title.

Susan L. Garrison
Assistant Attorney General
Opinion Committee